

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

Public Service Company of New Hampshire

DE 08-053

FPL Energy Maine Hydro, LLC

DE 08-123 and DE 08-124

Class IV Renewable Energy Certificate Eligibility Application for
Certain Existing Small Hydroelectric Facilities (consolidated proceedings)

**FPL ENERGY MAINE HYDRO, LLC MOTION FOR
RECONSIDERATION OR, IN THE ALTERNATIVE, REHEARING**

Pursuant to New Hampshire RSA 541:3 and PUC 203.07(a)-(d), FPL Energy Maine Hydro, LLC (“Maine Hydro”)¹ respectfully submits this motion for reconsideration or, in the alternative, rehearing of the Commission’s February 6, 2009 Order Consolidating Dockets and Annuling Class IV Source Certification for Certain Hydroelectric Facilities, Order No. 24,940 (“February 6th Order”). As the New Hampshire Legislature is now considering an act clarifying the eligibility requirements for Class IV renewable energy generating facilities, its passage will require the underlying annulment in the February 6th Order to be reversed in order to permit the legislation to produce its desired effect. Accordingly, the Commission should grant reconsideration or, in the alternative, rehearing of the February 6th Order.

¹ Maine Hydro is a wholly owned indirect subsidiary of NextEra Energy Resources, LLC (formerly, FPL Energy, LLC). FPL Energy, LLC changed its name to NextEra Energy Resources, LLC on January 7, 2009.

I. Background

This proceeding concerns applications filed by (i) Maine Hydro for the North Gorham Project and Bar Mills Project, and (ii) Public Service Company of New Hampshire (“PSNH”) requesting certification of certain small hydroelectric facilities to produce Class IV Renewal Energy Certificates (“RECs”) pursuant to RSA 362-F, the Electric Renewable Portfolio Standard (“RPS”) Law. On October 30, 2008, the Commission issued a secretarial letter order certifying both the North Gorham Project and the Bar Mills Project as eligible to produce Class IV RECs, though the letter order clarified that this finding may be affected by the outcome of the Commission’s proceeding in Docket No. DE 08-053, concerning the eligibility of PSNH’s facilities for Class IV RECs.

The background of this proceeding is set forth in detail in the February 6th Order and previously in Order No. 24,908 (Oct. 28, 2008), and Maine Hyrdo therefore will not repeat that history here. RSA 362-F:4, IV provides as follows:

Class IV (Existing Small Hydroelectric) shall include the production of electricity form hydroelectric energy, provided the source began operation prior to January 1, 2006, has a gross nameplate capacity of 5 MWs or less, has installed upstream and downstream diadromous fish passages that have been required and approved under the terms of its license or exemption from the Federal Energy Regulatory Commission, and when required, has documented applicable state water quality certification pursuant to section 401 of the Clean Water Act for hydroelectric projects.

In the February 6th Order, the Commission granted Granite State Hydropower Association’s (“GSHA”) motion to consolidate Docket Nos. DE 08-053, DE 08-123 and DE 08-124, finding that “[t]he three proceedings involve requests for similar relief and resolution of the proceedings devolves upon a statutory interpretation common among the

proceedings.”² The Commission concluded that such consolidation would promote the efficient conduct of the proceeding and would not prejudice Maine Hydro.³ Maine Hydro does not challenge this finding by the Commission.

The Commission then goes on to interpret two provisions in RSA 362-F:4, IV, which were briefed by PSNH and GSHA. First, the Commission determined that the phrase “gross nameplate capacity” comprises “the total capacity of a hydroelectric facility, i.e., a dam, and not to the capacity of a turbine that is a component part of that facility.”⁴ Second, in interpreting whether the statute conditions certification on facilities having both upstream and downstream diadromous fish passages, the Commission concluded that that statute is both “confusing and ambiguous,” and thus in accordance with case law it would be appropriate for the Commission to turn to the legislative history to aid the analysis.⁵ Upon review of the legislative history, the Commission concluded that while the legislation “could have been more artfully worded,” the Legislature intended that only those facilities that have both upstream and downstream fish passages are eligible for certification for Class IV RECs.⁶ Based on these findings, the Commission annulled the Class IV certifications of certain facilities owned by PSNH and Maine Hydro’s North Gorham and Bar Mills projects.⁷

II. Request for Reconsideration or, In the Alternative, Rehearing

Maine Hydro’s basis for seeking rehearing in this proceeding is grounded in the case law of this Commission and the New Hampshire Supreme Court. New Hampshire

² Order at p. 14.

³ *Id.*

⁴ *Id.* at p. 15.

⁵ *Id.* at pp. 15-16.

⁶ *Id.* at pp. 16-17.

⁷ *Id.* at p. 18.

RSA 541:3 provides that the Commission may grant rehearing when in the Commission's opinion "good reason for the rehearing is stated in the motion." RSA 541:4 provides that a motion for rehearing must set forth grounds by which the decision is either unlawful or unreasonable. Motions for rehearing direct attention to matters "overlooked or mistakenly conceived" in the original decision and require an examination of the record already before the fact finder. *Dumais v. State Personnel Comm'n*, 118 NH 309, 312 (1975). Good reason is also shown when a party demonstrates that ***new evidence exists that was unavailable at the original hearing***. *Consumers New Hampshire Water Co., Inc.*, 80 NH PUC 666 (1995), *cited in*, *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines*, 87 NH PUC 334 (2002) (emphasis added).

Since issuing the underlying February 6th Order, the New Hampshire Legislature has taken initial action on a bill clarifying certain eligibility requirements for Class IV renewable energy generating facilities. This legislation comprises new evidence that was not available at the time the Commission rendered its determination to annul the certifications of Maine Hydro's North Gorham and Bar Mills projects. If passed and signed into law, the legislation would bear directly on the eligibility of these projects to produce Class IV RECs prior to the effective date of the new provision.

On March 4, 2009, the House of Representatives passed HB 229 by voice vote, and the legislation must still be considered by the New Hampshire Senate. A copy of this bill is attached hereto as Appendix A. This legislation will amend RSA 362-F:4, IV by initially clarifying the intent related to which hydroelectric facilities are be eligible for Class IV RECs. Specifically, the legislation provides that:

(a) Class IV (Existing Small Hydroelectric) shall include the production of electricity from hydroelectric energy, provided the [~~source~~] ***facility*** began

operation prior to January 1, 2006, has a [~~gross~~] **total** nameplate capacity of 5 MWs or less **as measured by the sum of the nameplate capacities of all the generators at the facility**, has **actually** installed **both** upstream and downstream diadromous fish passages [~~that have been required and approved under the terms of its license or exemption from~~] **and such installations have been approved by** the Federal Energy Regulatory Commission, and when required, has documented applicable state water quality certification pursuant to section 401 of the Clean Water Act for hydroelectric projects.

Although this clarification in essence affirms the Commission's determinations interpreting the statutory intent in the underlying February 6th Order, the proposed amendment to RSA 362-F:4, IV goes on to provide a limited exception for facilities that were previously certified by the Commission as being eligible for Class IV RECs. A new provision, RSA 362-F:4, IV(b), provides as follows:

(b) Previously certified class IV sources that no longer meet certification requirements under this paragraph shall have their class IV certifications automatically revoked upon the effective date of this subparagraph. The commission shall issue all appropriate forms of notification to the previously certified class IV sources, and to the general information system (GIS) administrator, notifying the parties that certification has been revoked and specifying the date that certification was revoked. All class IV renewable energy certificates created before the effective date of this subparagraph by previously certified class IV sources, that will no longer be certified under this subparagraph, shall remain valid class IV renewable energy certificates that can be used or acquired for purposes of compliance with the electricity provider's requirements for class IV under RSA 362-F:3. Certificates shall be created by generation from a certified class IV facility.

Thus, assuming the passage of this amended provision, the Legislature clearly intends for Maine Hydro's North Gorham Project and Bar Mills Project (and certain PSNH projects) to be eligible for Class IV RECs during the period prior to the effective date of new RSA 362-F:4, IV(b) – January 1, 2010 as provided for in the legislation. Accordingly, the determination by the Commission in the February 6th Order to annul the certifications of

these projects would contradict the legislative intent, assuming the ultimate passage of this amended legislation.

There can be little question that the ambiguities addressed by the Commission in the February 6th Order and the pending legislation to amend RSA 362-F:4, IV provide for unique circumstances and the need for a unique procedural remedy. Maine Hydro urges the Commission to set aside its February 6th Order annulling the underlying certifications, at least temporarily, pending the outcome of the legislative initiative. If the legislation is enacted, the Commission will then be directed to notify the parties, including Maine Hydro, that their certifications have been revoked as of the effective date of the new RSA 362-F:4, IV(b) (January 1, 2010). The Commission, in any event, should use its discretion to craft a remedy that will permit the underlying legislation to produce its desired effect should it be passed. Thus, it is appropriate for the Commission to grant reconsideration or, in the alternative, rehearing of the underlying February 6th Order.

III. Conclusion

For the forgoing reasons, Maine Hydro respectfully urges the Commission to grant this motion for reconsideration or, in the alternative, rehearing of the February 6th Order annulling the certifications of Maine Hydro's North Gorham Project and Bar Mills

Project in order to permit the effectual enactment of the proposed legislation amending
RSA 362-F:4, IV, assuming the proposed legislation is passed into law.

Respectfully submitted,



Joel D. Newton
Senior Attorney
NextEra Energy Resources, LLC
801 Pennsylvania Ave., NW
Suite 220
Washington, DC 20004
(202) 347-7126
joel.newton@nexteraenergy.com

Certificate of Service

I hereby certify that on this 9th day March 2009, a copy of the foregoing has been served in accordance with the Commission's rules on all parties of record in these consolidated proceedings.

/s/ Joel D. Newton

Appendix A

HB 229 – AS AMENDED BY THE HOUSE

04Mar2009... 0193h

2009 SESSION

09-0364

06/09

HOUSE BILL 229

AN ACT clarifying the eligibility requirements for class IV renewable energy generating facilities.

SPONSORS: Rep. S. Harvey, Hills 21; Sen. Fuller Clark, Dist 24

COMMITTEE: Science, Technology and Energy

ANALYSIS

This bill clarifies certain eligibility requirements for class IV renewable energy generating facilities.

Explanation: Matter added to current law appears in *bold italics*.

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

04Mar2009... 0193h

09-0364

06/09

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Nine

AN ACT clarifying the eligibility requirements for class IV renewable energy generating facilities.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Electric Renewable Energy Classes. Amend RSA 362-F:4, IV to read as follows:

IV.(a) Class IV (Existing Small Hydroelectric) shall include the production of electricity from hydroelectric energy, provided the ~~[source]~~ **facility** began operation prior to January 1, 2006, has a ~~[gross]~~ **total** nameplate capacity of 5 MWs or less **as measured by the sum of the nameplate capacities of all the generators at the facility**, has **actually** installed **both** upstream and downstream diadromous fish passages ~~[that have been required and approved under the terms of its license or exemption from]~~ **and such installations have been approved by** the Federal Energy Regulatory Commission, and when required, has documented applicable state water quality certification pursuant to section 401 of the Clean Water Act for hydroelectric projects.

(b) Previously certified class IV sources that no longer meet certification requirements under this paragraph shall have their class IV certifications automatically revoked upon the effective date of this subparagraph. The commission shall issue all appropriate forms of notification to the previously certified class IV sources, and to the general information system (GIS) administrator, notifying the parties that certification has been revoked and specifying the date that certification was revoked. All class IV renewable energy certificates created before the effective date of this subparagraph by previously certified class IV sources, that will no longer be certified under this subparagraph, shall remain valid class IV renewable energy certificates that can be used or acquired for purposes of compliance with the electricity provider's requirements for class IV under RSA 362-F:3. Certificates shall be created by generation from a certified class IV facility.

2 Effective Date. This act shall take effect January 1, 2010.